Dato' Annas bin Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S6–23–54 OF 2007
HAMID SULTAN J
30 NOVEMBER 2012

Tort — Defamation — Absolute privilege — Letter of complaint/report sent to Anti-Corruption Agency regarding construction contract of complex — Letter of complaint/report published in newspaper — Whether report protected by absolute privilege — Whether issues ventilated by preceding suits that were identical in nature

In the present suit, the Chairman of Lembaga Kemajuan Ikan Malaysia ('LKIM') ('the fourth defendant') had sent a letter of complaint/report to the Anti-Corruption Agency ('ACA') regarding the award of a construction contract of a complex for LKIM. The award of the construction award was alleged to be questionable and called for an investigation. The first defendant caused to be written, printed and published three news reports of the letter of complaint/report, in all three of its newspapers. The plaintiff claimed against the defendants for the tort of defamation. However, the plaintiff had earlier filed a suit in respect of the publication of the *Berita Harian* report and the cause of action was also based on defamation ('Berita Harian suit') which was dismissed. The prayers sought and the defences in both suits were identical in nature. It was the defendants' contention that the issues had been ventilated and the plaintiff's attempt to proceed with the instant suit would amount to an abuse of process of the court and it was a fit and proper case to be struck out.

Held, striking out the claim with no order as to costs:

(1) The plaintiff attempted to re-litigate in a second proceeding. Identical issues of fact, law or mixed facts or law have already been determined and decided against him in the Berita Harian suit. The fact that the suit between the plaintiff and the defendants would proceed on the same facts and evidence involving largely the same witnesses as that in the Berita Harian suit which had already been heard and disposed of on the merits amounted to nothing but a sheer waste of time, costs and expenses of all involved. The plaintiff could have instead applied to consolidate the NST suit with the Berita Harian suit or applied to have them heard together so that the identical issues could have been dealt with and disposed of at the same time during the trial of the Berita Harian suit, but he chose not to do so. It would be an abuse of process to allow the same issues to be re-litigated in the instant case (see paras 5(o), (p), (r) & (s)).

(2) In a defamation action, there must be publication of defamatory words of and concerning the plaintiff personally. Where this is absent, the action would fail and the defence was bound to succeed and this would form another ground for striking out an action for being an abuse of the court process. There was no reference to the plaintiff in the NST report (see para 5(u)).

(3) The ACA reports were akin to police reports in that they both call for an investigation into suspected act of criminal wrong-doing and as such would also be protected by absolute privilege. The contents of the NST report were substantially a regurgitation of the letter of complaint/report to the ACA and as such the protection of absolute privilege surrounding the ACA report would also attach to the NST report in an ancillary manner granting it absolute privilege status as well. In the circumstances, any action in respect of the NST report was bound to fail (see para 5(x)).

[Bahasa Malaysia summary

Dalam tindakan ini, Pengerusi Lembaga Kemajuan Ikan Malaysia ('LKIM') ('defendan keempat') telah menghantar surat aduan/laporan kepada Agensi Anti Rasuah ('ACA') berkenaan award kontrak pembinaan kompleks untuk LKIM. Pengawardan award pembinaan didakwa menjadi persoalan dan perlu siasatan. Defendan pertama menulis, mencetak dan menerbitkan tiga laporan berita mengenai surat aduan/laporan, di dalam ketiga-tiga suratkhabarnya. Plaintif menuntut terhadap defendan-defendan untuk tort fitnah. Walau bagaimanapun, plaintif sebelumnya memfailkan tindakan berkaitan penerbitan laporan *Berita Harian* dan kausa tindakan juga berdasarkan fitnah ('tindakan Berita Harian') yang ditolak. Permohonan-permohonan yang dipohon dan pembelaan-pembelaan dalam kedua-dua tindakan adalah bersifat sama. Adalah hujahan defendan-defendan bahawa isu-isu telah diutarakan dan cubaan plaintif untuk meneruskan dengan tindakan ini merupakan penyalahgunaan proses mahkamah dan adalah kes yang betul dan wajar dibatalkan.

Diputuskan, membatalkan tuntutan tanpa perintah kepada kos:

(1) Plaintif mencuba untuk melitigasi semula dalam prosiding kedua. Isu fakta, undang-undang, atau fakta bercampur atau undang-undang yang sama telah ditentukan dan diputuskan terhadapnya di dalam tindakan Berita Harian. Fakta bahawa tindakan di antara plaintif dan defendan-defendan akan diteruskan atas fakta yang sama dan keterangan melibatkan sebahagian besarnya saksi yang sama seperti di dalam tindakan Berita Harian yang telah dibicarakan dan didengar atas merit yang merupakan pembaziran masa, kos dan pembelanjaan oleh semua yang terlibat. Plaintif sepatutnya memohon untuk menggabungkan tindakan NST dengan tindakan Berita Harian atau memohon untuk mendengar ia bersama oleh itu isu-isu sama boleh diuruskan dan

didengar pada masa yang sama semasa perbicaraan tindakan Berita Harian tersebut, tetapi dia memilih untuk tidak berbuat sedemikian. Ia akan menjadi penyalahgunaan proses untuk membenarkan isu-isu sama dilitigasi semula dalam kes ini (lihat perenggan 5(o), (p), (r) & (s)).

(2) Dalam tindakan fitnah, mesti terdapat penerbitan perkataan-perkataan fitnah dan berkaitan plaintif secara peribadi. Di mana ketiadaan ini, tindakan akan gagal dan pembelaan pasti berjaya dan ini akan membentuk alasan lain untuk membatalkan tindakan kerana menyalahguna proses mahkamah. Tidak terdapat rujukan kepada plaintif dalam laporan NST (lihat perenggan 5(u)).

(3) Laporan ACA adalah serupa laporan polis di mana kedua-dua perlu siasatan ke dalam tindakan kesalahan jenayah yang disyaki dan kerana ianya juga dilindungi oleh keutamaan mutlak. Kandungan laporan NST adalah sebahagian besarnya regurgitasi surat aduan/laporan kepada ACA dan oleh itu perlindungan keutamaan mutlak sedemikian yang melingkungi laporan ACA juga akan berkait kepada laporan NST di dalam cara sampingan memberikannya juga status keutamaan mutlak. Dalam keadaan ini, apa-apa tindakan berkaitan laporan NST pasti gagal (lihat perenggan 5(x)).]

Notes

For cases on absolute privilege, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 322–326.

Cases referred to

Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim [2011] 4 MLJ 346; [2009] 2 CLJ 121, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors [2011] 8 MLJ 747, HC (refd)

Foo Yong v Pang Ee Seng & Anor [2012] MLJU 1092, HC (refd)

Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75, CA (refd)

Schellenberg v BBC [2000] EMLR 296, QBD (refd)

Sulaihah binti Maimunni v UEM Builders Berhad & Anor [2012] MLJU 1088, HC (refd)

Legislation referred to

Rules of Court 2012 O 34, O 92 r 4

Shamsul Bahrain bin Ibrahim (Bahrain) for the plaintiff.

Rueben Mathiavaranam (Rueben Williams) for the first, second and third defendants.

Mahendra Mahason (M Mahendra & Co) for the fourth defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the decision to strike out the plaintiff's action pursuant to the jurisprudence advocated in the English Court of Appeal's decision in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75 which I have, inter alia, dealt with in two cases namely *Sulaihah binti Maimunni v UEM Builders Berhad & Anor* [2012] MLJU 1088, (decision delivered on 31 October 2012) and *Foo Yong v Pang Ee Seng & Anor* [2012] MLJU 1092, (decision delivered on 30 October 2012) where I have dealt with the jurisprudence in detail.

[2] I must say that this case though filed in the year 2007, came before me for the first case management on 5 October 2012. During the course of case management, learned counsel for the defendants informed me that on the same subject matter and facts, the plaintiff had also filed an action against other parties inclusive of newspaper publisher and the trial judge has dismissed the claim. The said judgment is reported as *Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors* [2011] 8 MLJ 747 where Justice Prasad Abraham in a concise, comprehensive and articulate judgment dismissed the plaintiff's claim. The learned judge held as follows:

(1) The impugned article reported allegations of wrong doing and was not a conclusive finding of fault against the Management of Lembaga Kemajuan Ikan Malaysia ('LKIM') save and except at the end where the comments of the plaintiff was sought in his capacity as director general of LKIM. The court was unable to find anything defamatory in relation to the plaintiff in respect of the matters raised in the impugned article (see para 3).

(2) Those who knew the plaintiff especially members of the administrative and diplomatic service, would know the report referred merely to a complaint to the anti-corruption agency. Further they would be aware when the plaintiff took over as director general of LKIM and that the matters referred to in the impugned article were before his appointment. The impugned article further made no reference to the plaintiff at all, to say that it was defamatory of the plaintiff. The alleged complaint was against the management of LKIM of which the plaintiff was the director general (see para 5).

(3) Looking at the impugned article as a whole and giving the same its natural and ordinary meaning, it remained an alleged complaint against the management of LKIM and not the plaintiff singularly (see para 6).

(4) The defence of qualified privilege through the concept of 'responsible journalism' gives a certain degree of latitude surrounding newspaper publications not available previously. It is a question of the rights of the plaintiff to the protection of his own reputation as opposed to the freedom

of expression and the role of the media in modern society. So long as the defendant advanced matters of public interest within the confines of responsible journalism, they were always be in a position to enjoin the court to declare the reassertion of the guarantee to the freedom of speech enshrined under art 10 of the Federal Constitution. This approach would be consonant with the aspirations of modern society for transparency and accountability whilst protecting against blatant maligning of the reputation of individuals.

[3] The defendants' counsel were unanimous in asserting that the issues had been ventilated and the plaintiff's attempt to proceed with this suit will amount to abuse of process of court and it is a fit and proper case to strike out the plaintiff's claim on reliance of the jurisprudence advocated in *Jameel*'s case.

[4] I invited all parties to file affidavits by way of case management directions pursuant to the power vested in court generally under the Rules of Court 2012, and specifically under O 34 and O 92 r 4 to show cause why the plaintiff's claim ought not be struck out in limine on the grounds of abuse of process of court.

[5] All the parties have filed their respective affidavits. The defendants have filed a comprehensive submission in encls 49–50 respectively and learned counsel for the plaintiff says he will rely on the plaintiff's affidavits filed. Learned counsel for the first to third defendants has set out the facts and law in encl 49. Much judicial time will be saved if it is repeated. Paragraphs 13–38, inter alia, as edited by court read as follows:

(a) whether the plaintiff's suit herein ought to be struck out as being an abuse of the court process under the robust and proactive approach as advocated in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75 and the Rules of Court 2012;

(b) the plaintiff at all material times was the director general of the Lembaga Kemajuan Ikan Malaysia (LKIM). The first defendant is owner, printer and publisher of *Berita Harian* ('BH'), *New Straits Times* ('NST') and *Harian Metro* ('HM') newspapers. The second defendant is the group editor-in-chief of NST. The third defendant is a journalist with the first defendant who writes for NST;

(c) at all material times, the chairman of LKIM was Adam Abdul Hamid who is also named as the fourth defendant in this suit. On 6 February 2007, he had submitted a letter of complaint/report to the ACA concerning LKIM's award of a construction contract for the construction of a complex for LKIM, costing RM55m which he claims is questionable and hence calling for their investigation;

(d) further to the letter of complaint/report to the ACA, on 10 April 2007, the first defendant newspaper company caused to be written, printed and published three news reports pertaining to the letter of complaint/report submitted to the ACA referred to in all three of its newspapers, namely in the BH, NST and HM. The common source of the subject matter therefore of all three news reports is solely the said letter of complaint/report submitted to the ACA by the LKTM chairman, the fourth defendant herein;

(e) in respect of the NST news report, the third defendant wrote and the first defendant newspaper company caused to be written, printed and published in their NST newspaper on 10 April 2007 at p 16, a news report entitled 'Malaysian Fisheries Development Authority - RM55m complex 'smells fishy' (NST report). The plaintiff claims that the impugned news report in the instant suit has defamed him. The impugned news report reported the following:

(i) The chairman of the Malaysian Fisheries Development Authority (LKIM), Adam Abdul Hamid had lodged a report with the Anti-corruption Agency, claiming that the management of LKIM had spent RM55 million on a complex in Kuala Kedah, Kedah, without an open tender;

(ii) According to him the complex completed earlier at the costs of RM29 million cannot be used as the jetty was 10 meters from the seashore;

(iii) The company/contractor responsible for building the complex was hence also awarded a contract to dredge sand to allow sea water to enter the jetty at a rate of RM100 per cubic meter of sand removed whereas the Public Works Department rate is merely RM30;

(iv) The projects/contracts according Adam, were awarded through direct negotiations whereas the procedures for awarding government contracts stipulate that direct negotiations are only to take place when certain expertise is needed and there are no companies available with the requisite expertise to offer the services required;

(v) Adam also questioned the LKIM's managements' decision to purchase a building in Kota Bharu despite the fact that LKIM already had a building housing its headquarters there;

(vi) He said that a deposit of RM445,000 had been paid for the acquisition of the building which cost RM4.45 million;

(vii) The Board of Directors were never informed by the LKIM management of the acquisition of the new building and the purchase was done without the knowledge of the Board;

(viii) Plans are also a foot to build a 3 star hotel in Kuala Selangor;

(ix) Adam also says that public funds allocated to LKIM should not be wasted and it should be spent wisely;

(x) In the meantime, LKIM Director General, Datuk Annas Khatib Jaafar, when contacted said he had no knowledge of the allegations made against LKIM's management.

(f) in respect of the NST report, the first defendant also caused to be written, printed and published a news report in their BH newspaper on its front page entitled 'Pembinaan Kompleks LKIM Kuala Kedah Ke BPR' (BH report) reporting exactly the same matters as in the NST report;

(g) both the reports arose out of an identical factual background, namely the letter of complaint/report to the ACA submitted by the LKIM chairman surrounding LKIM's award of a construction contract for the construction of a complex for LKIM costing RM55m, which he claims is questionable. This is evident from the first and second paragraphs of the BH report;

(h) unhappy with the contents of the NST report the plaintiff commenced the instant suit against the defendants for defamation on 1 June 2007;

(i) however, earlier on 8 May 2007, the plaintiff with regard to the present suit had also filed a case Suit No S6-23–37 of 2007 in respect of the publication of the BH report (BH suit) against the first and fourth defendants in the present suit and two other employees of the first defendant. The cause of action in the BH suit, like in the present suit, is one based on defamation (libel). The prayers sought for in the present suit and the BH suit, save for one, are also identical;

(j) both the statements of defence are the same in content and they raise exactly identical defences of: (i) non-reference to the plaintiff; (ii) that the words do not carry a meaning defamatory of the plaintiff; and/or in the alternative (iii) the words were published on an occasion of qualified privilege of the Reynolds privilege species, in that they were published in full compliance with the duties of responsible journalism on a matter of public interest;

(k) the agreed facts, non-agreed facts and issues to be tried filed in the earlier BH suit are identical to the ones filed in the present suit. This is clear when one does a comparison;

(l) the earlier BH suit was heard and disposed of after a full trial on 3 November 2010. The fourth defendant was absent from the outset of trial. On 20 December 2010, the presiding learned Judicial Commissioner, Dr Prasad Sandosham Abraham (as His Lordship then was) dismissed the plaintiff's claim against the first, second and third defendants in the BH suit with;

(m) the writer of the BH report in the BH suit, Wan Hazmir Bakar who was named as a defendant in the BH suit had testified together with the third defendant in the present suit, Farrah Naz Karim, in the trial of the BH suit;

(n) the defendants assert:

(i) both the reports are substantially, if not wholly, identical news reports in content, and were published on the same day and time although in different newspapers. Both newspapers however are owned by the first defendant in this present suit who was also the second defendant in the BH suit;

(ii) the first defendant's group editor, second and third defendants in the present suit and the third defendant journalist in the BH suit are all employees of the first defendant in this present suit;

(iii) the issues arising out of the publication of both reports are the same;

(iv) the publication of both the reports arise out of the same singular set of identical facts;

(v) as such the trial of this present suit is dependent on the same evidence adduced in the BH suit; and

(vi) the defences relied on in the BH suit are identical to the defences relied on in this present NST suit;

(o) the plaintiff in this present suit is attempting to re-litigate in a second proceeding. Identical issues of fact, law or mixed fact or law have already been determined and decided against him in the earlier BH suit. The proverbial 'second bite at the cherry' entails new and additional days of court hearing involving the further use of the court's time and resources and expense;

(p) in view of the fact that the trial of this suit between the plaintiff and the first, second and third defendants will proceed on the same facts and evidence involving largely the same witnesses as that in the earlier BH suit which has already been heard and disposed of on the merits, amounts to nothing but a sheer waste of time, cost and expense of all involved. In other words, the plaintiff's desire for a verdict from the court after trial would be out of proportion to the time and costs involved as well as the use of the court's resources, in light of the fact that a decision has already been made by the court in the BH suit;

(q) it is reasonable to conclude that the plaintiff's insistence on pursuing and proceeding with this NST suit: (i) is in the hope of salvaging something from the disastrous outcome of a previous suit such as to be characterised as a desperate exercise of damage limitation and 'one last throw of the dice'; and (ii) creates a situation where 'there is no realistic prospect of the

trial yielding any tangible or legitimate advantage, such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources' as was found by Eady J in the *Schellenberg v BBC* [2000] EMLR 296 which led the learned judge to strike out the case as being an abuse of process;

(r) the plaintiff could have applied to consolidate this NST suit with the earlier BH suit or applied to have them heard together so that the identical issues could have been dealt with and disposed of at the same time during the trial of the BH suit earlier, but he chose not to do so. This has been viewed by our Federal Court as being an abuse of process (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783);

(s) as such, and based on the other grounds mentioned earlier above, it is asserted that it would be an abuse of process to allow the same issues to be relitigated in this NST suit as advocated in *Jameel*'s case, which approach our CJ has commended to our judiciary and which is also envisaged under our new Rules of Court 2012 by striking out the plaintiff's suit herein as it is simply not worth the court's time, costs and resources. In other words, 'the game is not worth the candle', especially since it is out of proportion to the proceedings before it;

(t) a yet further and/or alternative ground for striking out an action as being an abuse of the court process is where the defence is bound to succeed;

(u) when the NST report is examined closely, it will be noticed that there is no reference to the plaintiff (apart from the last paragraph of the report where his comments were sought in his capacity as LKIM's director general about the allegations leveled against LKIM's management). In other words, there is no publication of defamatory words of and concerning the plaintiff's personally. It is trite that in a defamation action, there must be 'publication of defamatory words of and concerning the plaintiff personally'. This is an essential pre-requisite. Where this is absent, the action will fail and the defence is bound to succeed;

(v) additionally, the contents of the NST report are substantially a regurgitation of the letter of complaint/report to the ACA. An ACA report calling for an investigation, it is asserted is akin to a police report. The contents of the NST report raises serious issues of public interest, to wit the allegations of mismanagement and impropriety in LKIM, a government agency/statutory body over the awarding of a contract to build a multimillion ringgit complex and calls for an investigation into the same;

(w) police reports have been held by the Court of Appeal in *Abdul Manaf bin*

Ahmad v Mohd Kamil Datuk Haji Mohd Kassim [2011] 4 MLJ 346; [2009] 2 CLJ 121 as being absolutely privileged and no action may lie in respect of it;

(x) likewise, it is asserted that ACA reports are akin to police reports in that they both call for an investigation into suspected acts of criminal wrong-doing (corruption), and as such would also be protected by absolute privilege. In the instant case, the NST report, as mentioned earlier, regurgitated substantially the contents of the ACA report concerned. As such the protection of absolute privilege surrounding the ACA report would also attach to the NST report in an ancillary manner granting it absolute privilege status as well. In the result, any action in respect of the NST report is bound to fail; and

(y) in all the circumstances, this is an appropriate case to be struck out as being an abuse of process.

[6] After having perused the affidavits and submission in detail, I take the view that this is a fit and proper case to strike out the plaintiff's claim. My reasons, inter alia, are as follows:

(a) I find much merit in the submission of learned counsel for the first to third defendants in encl 49 in particular paras 13–37; and

(b) I also agree with the submission of the fourth defendant in encl 50.

[7] For reasons stated above, the plaintiff's claim is struck out. As the defendants did not make the application at the earliest opportunity, I make no order as to costs.

[8] I hereby order so.

Claim strike out with no order as to costs.

Reported by Afiq Mohamad Noor